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## The Honorable Theodore McMillian

### *Leading the Way*

*Portrait Ceremony, September 10, 2003*

Theodore McMillian is a remarkable man. He did not choose an easy path. In fact, no one had gone before him. Throughout his life, he has been the first to break down long-standing racial barriers, rising to sit on the second highest court in the land. And as he has led the way, he has continually helped others to follow.

### Early Years

Theodore McMillian was born on January 28, 1919, in St. Louis, Missouri, at 901 South 14<sup>th</sup> Street. He grew up in an impoverished area of the City of St. Louis as the oldest of ten children. He was raised by his mother, stepfather, and grandmother, all of whom worked to support the family. He was inspired by his hardworking grandmother who placed breakfast on the coal stove warmer for everyone before heading off to work before sunrise. She encouraged him to work hard and get an education, and this work ethic was his inheritance. He proved to be an excellent student at Vashon High School, where he served as class president and was a member of the National Honor Society. After only three and a half years, he graduated first in his class.

Following high school, he attended Stowe Teachers College and then Lincoln University in Jefferson City, the only accredited public four-year institution open to African Americans in Missouri at that time. At Lincoln University, he worked in the college kitchen to help pay his way during the first year. As a sophomore, the school gave him a job teaching classes in mathematics as well as a physics lab. He graduated Phi Beta Kappa in 1941 with degrees in mathematics and physics.

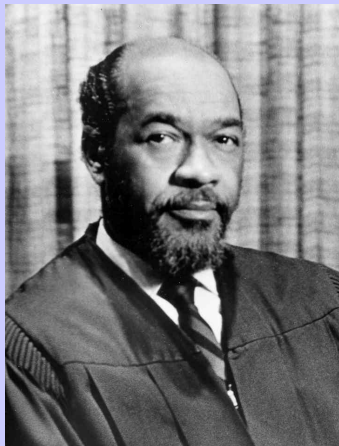
On December 8, 1941, he married Minnie Foster, and in 1942 he was drafted to serve in the United States Army. He achieved the rank of first lieutenant in the Army Signal Corps, which specialized in communications. As one of the few black officers, he was barred from the white officers club and swimming area. Later, as a practicing attorney, he would win a case making segregated swimming pools illegal in Webster Groves.

After his discharge from the Army in 1946, he began law school at Saint Louis University. He had dreamed of studying medicine, but racial quotas at medical schools would have forced him to wait five years to begin. Although law was not his first choice and he had to work as a janitor before and after classes to support his wife and son, he excelled as a law student. He served as associate editor of the School's first law review, the *Intramural Law Review*, graduated first in his class in 1949, and was the first African American to be inducted into Alpha Sigma Nu, a Jesuit national honor society.

## Early Career and State Judiciary

Despite his success as a law student, racial discrimination made it difficult for McMillian to find a position with any of the law firms in St. Louis. Determined to practice law, he and Alphonse Lynch, an African American classmate, established the firm of Lynch & McMillian. Their firm was located just outside downtown St. Louis, since African Americans were unable to rent office space downtown. Unable to support his family on the meager earnings of his legal practice, he taught adult education classes and managed the old Aubert Theatre at night.

In 1953, Edward L. Dowd hired McMillian as the first African American Assistant Circuit Attorney for the City of St. Louis. He made a name for himself as a diligent prosecutor with a high conviction rate, but at the same time he maintained a healthy respect for the civil rights of defendants.



His hard work and ethical standards served him well, winning him an appointment to the St. Louis City Circuit Court, 22<sup>nd</sup> Judicial District, in 1956. He was the first African American judge to

serve on a circuit court in Missouri. As a state circuit judge, he focused on violent crime and became an advocate for reform in the juvenile courts.

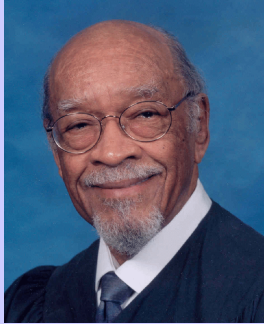
As a member of the Berkeley Associates—a group of judges, corrections officers, police and civilians—he actually infiltrated the penal system to see what it was like on the inside. He was given a fake criminal record, photographed, and allowed to co-exist with

prisoners. This experience and his years on the juvenile courts bench left an indelible impression on him. He wished that hard line jurists could actually see the penal institutions to which they were sending people before handing down sentences. And he realized that juvenile court is extremely important because if young offenders can be helped at that level, perhaps future crimes could be deterred. Never failing to take action, Judge McMillian initiated a series of reforms and civic programs designed to help address these problems.

In 1972, Judge McMillian was appointed to the Missouri Court of Appeals for the Eastern District by Governor Warren E. Hearnes. He was the first African American appointed to that Court and served from 1972 to 1978. He continued to build a reputation for diligence and fairness, and he became an even stronger advocate of civil rights. He frequently criticized the U.S. Supreme Court's high standard for proving the exclusion of jurors based on race, most notably in *State v. Davis*, 529 S.W. 2d 10 (Mo. Ct. App. 1975). He also took a stand against mandatory minimum sentences, arguing that they were an unconstitutional usurpation of the court's power to grant probation. *State v. Motley*, 546 S.W. 2d 435 (Mo. Ct. App. 1977) (McMillian, J. dissenting).

During his years with the Missouri state courts, Judge McMillian served as a faculty member, associate professor or lecturer at the following colleges and universities: Saint Louis University Law School (1957 to 1972); the University of Missouri at St. Louis (1968 to 1978); Webster College (1977 to 1983); the National College of Juvenile Justice at the University of Nevada (1972 to 1978); and the National College of State Trial Judges at the University of Nevada at Reno (1964 to 1977).

## Federal Judiciary



In 1978, Judge McMillian was appointed to the U.S. Court of Appeals for the Eighth Circuit by President Jimmy Carter. He was the first African American appointed to the federal bench in the seven states of the Eighth Circuit. Since his appointment 25 years ago, he has written over 1200 opinions, some of which paved the way for landmark Supreme Court rulings.

Judge McMillian is a member of the Lawyers Association of the City of St. Louis, Mound City Bar Association, Missouri Bar Association, and National Bar Association. He served as a member of the Judicial Conference Subcommittee on Federal/State Relations from 1982 to 1987, and a member of the Committee on Space and Facilities from 1987 to 1990. He had the third longest active service as a court of appeals judge in the nation when he took senior status on July 1, 2003.

During his time as a federal circuit judge he has continued to impress his colleagues and the legal community with his intelligence, objectivity, diligence, compassion, and dignity. His commitment to the law continues and is equaled only by his commitment to the people it affects.

### *Notable Opinions*

Jury Selection In *United States v. Childress*, 715 F.2d 1313 (8<sup>th</sup> Cir. 1983), Judge McMillian, writing for the majority, argued that the burden of proof for showing juror exclusion based on race was far too high. As in his dissenting opinions for the Missouri Court of Appeals, he acknowledged precedent that had concluded the standard was reasonable, but he argued that reality indicated

otherwise. Citing flaws in the case precedent along with detailed research showing that the standard had been met on only two occasions between 1965 and 1983, Judge McMillian made a strong case for change. Three years later, the U.S. Supreme Court ruled that such exclusions were a violation of the Fourteenth Amendment and used the research presented in *Childress* to illustrate the insurmountable burden on defendants.

Sexual Harassment In a case of first impression for the Eighth Circuit concerning sexual harassment, Judge McMillian ruled that Title VII allows a cause of action for sexually hostile environment harassment. He reasoned that to deny this cause of action would allow employers to create a work environment characterized by offensive or intimidating behavior with impunity, as long as no formal action was taken against the victim for her resistance. *Moylan v. Maries County*, 792 F.2d 746 (8<sup>th</sup> Cir. 1986). His ruling was supported by a similar ruling handed down by the U.S. Supreme Court later that year. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

Religion and Education In *Mergens v. Board of Education*, Judge McMillian ruled that a Nebraska public school district violated the Equal Access Act of 1984 when it would not allow a Bible study group to become part of the school's official student activity program due to the group's religious focus. The Act prohibits any public high school that receives federal funds and allows non-curriculum-related student groups to meet on campus from discriminating against any student group based on the content of speech at their group meetings. He ruled that the intent behind the Act was to prevent discrimination against free speech, and that if a school allows one non-curriculum student group to use school facilities, then it must provide the same access to other student groups. 867 F.2d 1076 (8<sup>th</sup> Cir. 1989).

## Community Service and Awards

As a jurist, Judge McMillian has striven to improve the lives of others through his opinions. As an individual, he has done this through community service.

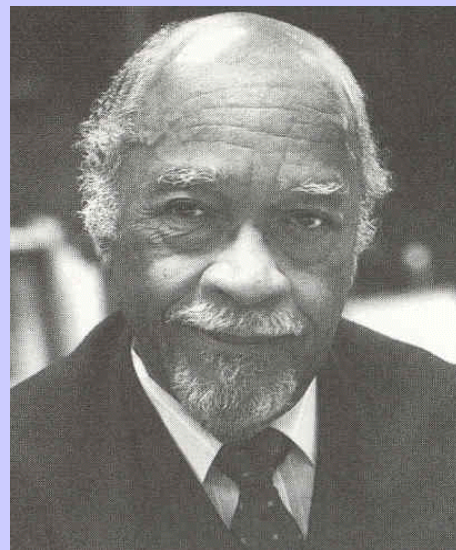
While a judge for the state of Missouri, Judge McMillian initiated a number of local and national programs designed to combat delinquency and poverty. In the late 1960s, he founded the Herbert Hoover Boys & Girls Club of St. Louis and served as its president. He served as the first board chair from 1965 to 1977 for the Human Development Corporation, an anti-poverty agency, and was on the first national board of the Office of Economic Opportunity's Legal Services Program, now the Legal Services of Eastern Missouri. In addition, he served for a decade as president of the St. Louis Urban League and served on the board of St. Louis Catholic Charities, as well as many other civic boards.

Judge McMillian has also been a mentor to many budding attorneys. For over 25 years he has served as supervising judge for judicial clerkship interns with Washington University Law School and Saint Louis University Law School. In 1999, in honor of his 80<sup>th</sup> birthday, Judge McMillian endowed the Theodore McMillian Scholarship Fund for Minority Students at Saint Louis University Law School. The fund now also supports internships at Legal Services of Eastern Missouri.

Judge McMillian, a man of firsts in his own career, has also helped create beginnings for others. His contributions to both the civic and legal communities have earned him numerous honors and awards. Among these are the American Judicature Society's Herbert Harley Award, the St. Louis Chapter of the American Civil Liberties Union's Civil Liberties Award,

the St. Louis Lawyers Association, Jurist Division's Award of Honor, the Bar Association of Metropolitan St. Louis' Foundation Award and Distinguished Lawyer Award. He is an Honorary Diplomat of the American Board of Trial Advocates and has been inducted into the National Bar Association Hall of Fame. Most recently, he received the 2003 Spirit of Excellence Award from the American Bar Association's Commission on Racial and Ethnic Diversity in the Profession. This award is given to attorneys who are trail blazers, role models, or mentors—those who have overcome enormous obstacles to assist in the advancement of lawyers from diverse backgrounds.

The Spirit of Excellence Award is especially fitting. Despite poverty and racial barriers faced throughout his life, Theodore McMillian has accomplished great things for himself and others. Despite his many achievements and the recognition he has received, he has an abiding sense of modesty which is evidenced by the sign in his office that reads, "It is much more important to be human than to be important."





# **The Honorable Theodore McMillian**

## **Firsts**

- First in class, Vashon High School, 1936
- First African American named to Alpha Sigma Nu, a Jesuit national honor society, 1949
- First associate editor of Saint Louis University's first law review, *Intramural Law Review*, 1949
- First in class, Saint Louis University School of Law, 1949
- First African American Assistant Circuit Attorney for the City of St. Louis, 1953
- First African American Judge, St. Louis City Circuit Court, 22<sup>nd</sup> Judicial District, 1956
- First African American Judge, Missouri Court of Appeals, Eastern District, 1972
- First African American Judge, U.S. Court of Appeals for the Eighth Circuit, 1978
- First African American appointed to the federal bench in the seven states of the Eighth Circuit, 1978

## **Community Service**

### ***Founder/Charter Member***

Herbert Hoover Boys and Girls' Clubs, founder and past president  
Human Development Corporation of Metropolitan St. Louis, first board chair  
Office of Economic Opportunity Legal Services Program, member of first national board  
Theodore McMillian Scholarship Fund for Minority Students, Saint Louis University School of Law

### ***Boards and Committees***

National Council of Juvenile Court Judges (president)  
American Judicature Society  
John Jay Steering Committee of the Academy of Criminal Justice Sciences  
Missouri Council of Law Enforcement Administration  
National Advisory Board of Law Enforcement Administration  
National Council on Crime and Delinquency  
Missouri Social Welfare Association  
Urban League of Metropolitan St. Louis (president)  
St. Louis Minority Economic Development Agency (chair)  
President's Council of Saint Louis University  
Board of Trustees of Blue Cross and Blue Shield  
Advisory Council of the Danforth Foundation  
Board of Directors of Tower Village (president)  
Board of Catholic Charities of the City of St. Louis  
Executive Committee of the St. Louis Crime Commission  
"Challenge of the Seventies" Social Division for the City of St. Louis (subdivision chair)

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## Special Awards and Honors

Spirit of Excellence Award, American Bar Association, Commission on Racial and Ethnic Diversity in the Profession, 2003  
Distinguished Non-Alumnus Award, University of Missouri–Columbia School of Law, 1999  
Order of Thomas More, Saint Louis University School of Law, 1999  
Resolution of Recognition, Missouri House of Representatives, 1999  
Recognition Award, Webster Groves Dr. Martin Luther King, Jr. Committee, 1997  
Honorary Diplomate Award, American Board of Trial Advocates, 1996  
Distinguished Lawyer Award, Bar Association of Metropolitan St. Louis, 1996  
Civil Liberties Award, American Civil Liberties Union, St. Louis Chapter, 1995  
Recognition Award, St. Louis Lawyers Association, 1993  
Foundation Award, Bar Association of Metropolitan St. Louis, 1992  
Inductee, National Bar Association Hall of Fame, 1992  
Honorary Doctor of Laws, Saint Louis University School of Law, 1992  
Resolution of Recognition, City of St. Louis Board of Aldermen, 1991 and 1996  
Herbert Harley Award, American Judicature Society, 1988  
Democracy in Action Award, American Jewish Congress, St. Louis Chapter, 1988  
Community Service Award, Saint Louis University, Black Law Student Association, 1986  
Distinguished Alumnus Award, Harris-Stowe State College, 1985  
Honorary Doctor of Humanities, Lincoln University, 1981  
Honorary Doctor of Humanities, University of Missouri, 1978  
Special Recognition Award, Human Development Corporation, 1977  
Resolution of Recognition, Missouri Senate, 1977  
Honorary Phi Beta Kappa, Saint Louis University School of Law, 1974  
Certificate of Appreciation, Missouri Governor Warren E. Hearnes, 1972  
Award of Honor, St. Louis Lawyers Association, Jurist Division, 1970  
Alumni Merit Award, Saint Louis University School of Law, 1965  
Alpha Sigma Nu, Jesuit national honor society, member since 1949  
Phi Beta Kappa, Lincoln University, member since 1941  
(and many more)

### For more information on Judge McMillian:

*A Tribute to the Honorable Theodore McMillian*, 43 SAINT LOUIS UNIVERSITY LAW JOURNAL 1257 (1999).

*Tribute to Judge Theodore McMillian*, 52 WASHINGTON UNIVERSITY JOURNAL OF URBAN AND CONTEMPORARY LAW 1 (1997).

Stephanie Ellis, *The Importance of Being Human: The Honorable Theodore McMillian*, '49, SAINT LOUIS BRIEF, Spring 2003, at 10.

William J. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH MAGAZINE, Aug. 11, 1991, at 8.

Terry Winkelmann, *Court Appeal*, ST. LOUIS TIMES, Feb. 1996, at 14.



*Prepared by the U.S. Courts Library, 8<sup>th</sup> Circuit*